(2)

No. 09-766

In the Supreme Court of the United States

PALMYRA PACIFIC SEAFOODS, L.L.C., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
JEANNE E. DAVIDSON
MARK A. MELNICK
MAAME A.F. EWUSI-MENSAH
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the trial court's dismissal of petitioners' takings claims because the government's establishment of a National Wildlife Refuge and regulation of commercial fishing in the sovereign waters surrounding the Palmyra Atoll did not take petitioners' private contract rights to establish a commercial fishing operation on the atoll itself.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 561 F.3d 1361. The opinion of the Court of Federal Claims (Pet. App. 23a-46a) is reported at 80 Fed. Cl. 228.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2009. A petition for rehearing was denied on September 29, 2009 (Pet. App. 47a-48a). The petition for a writ of certiorari was filed on December 28, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Palmyra Atoll is a United States territory located approximately 1000 miles south of Hawaii. Pet. App. 24a. The territorial sea (the water immediately adjacent to the coast) and the submerged lands underneath those waters are held by the United States as a fundamental aspect of its sovereignty. See, *e.g.*, *Montana* v. *United States*, 450 U.S. 544, 551-552 (1981); *United States* v. *California*, 332 U.S. 19, 34-35, 38 (1947). The atoll is surrounded by a 200-mile Exclusive Economic Zone (EEZ) over which the United States has sovereignty. Pet. App. 24a. An exclusive economic zone is an area in which a nation has special rights over the exploration and use of marine resources, and it typically extends 200 nautical miles beyond the territorial sea. See *Black's Law Dictionary* 647, 1729 (9th ed. 2009). The United States has the authority to manage natural resources, including the power to regulate fishing, within the EEZ. Pet. App. 24a; see Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983) (establishing the EEZ and asserting United States' sovereignty over the EEZ).

During World War II, President Franklin D. Roosevelt issued an Executive Order establishing a Naval Defensive Sea Area and Naval Airspace Reservation over the territorial waters from the high-water mark out to a three-mile boundary surrounding the Palmyra Atoll. Pet. App. 24a; see Exec. Order No. 8682, 6 Fed. Reg. 1015 (1941), discontinued by Exec. Order No. 9881, 12 Fed. Reg. 5325 (1947). During the war, the United States established a naval base on the Palmyra Atoll, including an airstrip, dock, harbor, and base camp. Pet. App. 24a. After the war, the United States sued to quiet title to the Palmyra Atoll. This Court determined in that suit that the Fullard-Leo family had obtained fee

simple title to the majority of the emergent land of the atoll through a series of conveyances that began with a grant from the Kingdom of Hawaii. See *United States* v. *Fullard-Leo*, 331 U.S. 256, 265-281 (1947).

Through a series of licenses, sublicenses, and consents (collectively referred to here as the Palmyra Licenses), the Fullard-Leo family conveyed to petitioners the exclusive right to establish a commercial fishing operation on the Palmyra Atoll, including the right to use the emergent land of the atoll "for commercial fishing and related transport and support operations," and the right to use the airstrip, dock, harbor, and base camp. Pet. App. 2a-3a; C.A. App. A200081, A200250-A200261. The Fullard-Leo family later sold part of the emergent land of the atoll to The Nature Conservancy, subject to the Palmyra Licenses. Pet. App. 25a.

In January 2001, pursuant to the National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. 668dd(a), the Secretary of the Interior established the Palmyra Atoll National Wildlife Refuge. Pet. App. 4a; see C.A. App. A200107-A200109 (Secretarial Order 3224). The Refuge was established "to protect and preserve the natural character of fish, wildlife, plants, coral reef communities and other resources associated with the tidal lands, submerged lands, and waters of Palmyra." *Id.* at A200107. The Refuge consists of the Palmyra Atoll's tidal lands, submerged lands, and waters out to 12 nautical miles; that area comprises less than five percent of the EEZ. Pet. App. 4a; see C.A. App. A200107-A200109.

The Department of the Interior published a regulation closing the Refuge to commercial fishing. Pet. App. 4a; see 66 Fed. Reg. 7660-7661 (2001). The regulation states that the government will "close the refuge to com-

mercial fishing but will permit a low level of compatible recreational fishing for bonefishing and deep water sportfishing under programs that [the government] will carefully manage to ensure compatibility with refuge purposes." Pet. App. 4a (quoting regulation). The Nature Conservancy then conveyed approximately 444 acres of emergent land of the Palmyra Atoll to the United States for addition to the Refuge, subject to the Palmyra Licenses. *Id.* at 4a-5a; see C.A. App. A200148-A200165, A200167-A200174.

2. Petitioners sued the United States in the Court of Federal Claims (CFC), alleging that the designation of the National Wildlife Refuge and the accompanying Department of the Interior regulation effected a taking of their property without just compensation in violation of the Just Compensation Clause of the Fifth Amendment. Pet. App. 4a-5a; see C.A. App. A200001-A200012 (complaint). Petitioners contended that the United States had "directly confiscated, taken, and rendered wholly and completely worthless" their property interests, as "embodied and reflected" in the Palmyra Licenses. Pet. App. 4a-5a (quoting C.A. App. A200007 (¶ 37)). Petitioners alleged both that the government had effected a "categorical taking" of their property by "taking and rendering worthless [their] rights under the Palmyra License[s]," C.A. App. A200009 (¶ 46-47), and that the government had effected a "regulatory taking" by "den[ying] [petitioners] any and all economically viable use of the Palmyra License[s]," *id.* at A200010 (¶ 51). The government moved to dismiss petitioners' complaint, or, in the alternative, for summary judgment. Pet. App. 5a.

3. The CFC granted the government's motion to dismiss petitioners' complaint. Pet. App. 23a-45a. The

court applied a two-part test, asking (a) whether petitioners had established a property interest for purposes of the Fifth Amendment, and (b) whether the governmental action at issue amounted to a compensable taking of that property. *Id.* at 29a-30a. The court found that petitioners had asserted a property interest in a series of licenses that permit them to conduct commercial fishing operations on the emergent land of the Palmyra Atoll. *Id.* at 30a-31a. The court further explained that the crucial question was not whether petitioners possessed any property interest, but whether their asserted property interests "actually w[ere] the subject of the alleged taking." *Id.* at 33a.

The CFC concluded that the government's establishment of the Refuge and closure of the Refuge to commercial fishing did not take petitioners' property. The court held that, even assuming petitioners' licenses were property rights that would be cognizable in a takings action, the licenses were not the subject of the relevant government action. Pet. App. 34a-45a. The court explained that the government had not appropriated or regulated petitioners' licenses; instead, it had regulated the tidal lands, submerged lands, and waters off the shore of the Palmyra Atoll, an area where petitioners conceded that they had no property rights. *Ibid.* Thus, the court explained, whether petitioners' "property interest in the licenses has lost value by virtue of the loss of commercial fishing access to the waters surrounding Palmyra is of no moment, because such loss in value was not occasioned by governmental restrictions on a constitutionally cognizable property interest possessed by [petitioners]." *Id.* at 35a.

In so holding, the CFC relied on this Court's decision in *Omnia Commercial Co.* v. *United States*, 261 U.S.

502, 508-510 (1923). The Court in *Omnia* explained that, although the government's taking of contract rights (in that case, a contract to purchase steel) would be compensable, the government is not liable if it simply regulates the subject-matter of the contract (by, for example, requisitioning steel from the manufacturer) and that regulation has the effect of injuring another contracting party. Pet. App. 36a-37a. Here, the CFC explained, petitioners' only contractual right was to use the emergent land of the Palmyra Atoll to establish a commercial fishing operation; the Fuller-Leo family had no authority to grant petitioners any right to fish in the surrounding waters. *Id.* at 35a. The CFC concluded that because the government had not regulated petitioners' property rights, but instead had taken lawful action in an area over which it held sovereign authority, its actions did not effect a taking. *Id.* at 45a.

4. The court of appeals affirmed. Pet. App. 1a-22a. The court explained that a plaintiff in a takings action "must point to a protectable property interest that is asserted to be the subject of the taking." *Id.* at 6a. The court recognized that "contract rights can be the subject of a takings action." *Ibid.* It held, however, that the government's regulation of activities in its own waters did not take petitioners' contract rights to conduct operations on the emergent land of the Palmyra Atoll.

Relying on this Court's decisions in *Omnia* and in *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106 (1924), the court of appeals explained that the government generally "does not 'take' contract rights pertaining to a contract between two private parties simply by engaging in lawful action that affects the value of one of the parties' contract rights." Pet. App. 7a. The court explained that this Court in *Omnia* had distinguished

between a "claimed taking of the subject matter of a contract and the taking of the contract itself," and had held that the government does not take contract rights by acquiring or regulating the subject matter of the contract. *Id.* at 8a. On the other hand, the court of appeals explained, this Court had found a taking of contract rights in *Brooks-Scanlon*, *supra*, where a Presidential order had appropriated a contract to build a ship, and the government had "put itself in the shoes of [the] claimant and [taken] from [the] claimant and appropriated to the use of the United States all the rights and advantages that an assignee of the contract would have had." *Id.* at 8a-9a (quoting 265 U.S. at 120).

In this case, the court of appeals observed, petitioners had asserted a property right to conduct fishing operations on the land of the Palmyra Atoll. Pet. App. 10a. The court explained that "[t]he problem with that argument is that the Interior Department's regulation does not prohibit commercial fishing operations on Palmyra—it merely prohibits commercial fishing activity in the surrounding waters." *Ibid.* The court noted that petitioners had not asserted a right to fish in the waters around Palmyra, and that any such claim would fail as a matter of law. *Id.* at 10a n.1. The court determined that "[t]he fact that the government's regulation of activities in the waters surrounding Palmyra may have adversely affected the value of [petitioners'] contract rights to engage in activities on shore [was] not sufficient to constitute a compensable taking." *Id.* at 10a-11a.

The court of appeals also rejected petitioners' argument that the government had taken their property by allegedly "targeting" their contract rights. Pet. App. 17a-19a. The court explained that under *Omnia*, the crucial question was whether the government had di-

rectly appropriated or regulated petitioners' property. *Id.* at 17a. The court concluded that, because the government's regulation of activities in its own waters "regulated conduct as to which [petitioners] had no protectable property interest," that regulation "did not constitute a taking for which compensation had to be paid." *Id.* at 19a.

Finally, the court of appeals rejected petitioners' arguments that the government's regulation would interfere with their rights to use a pier on Palmyra and to traverse the Refuge to reach the open fishing waters beyond the Refuge. Pet. App. 19a-22a. The court determined that petitioners had waived any claim that they would be denied access to the pier, and that, in any event, "there is nothing on the face of the regulation that suggests any restriction on the use of the pier." *Id.* at 19a. With regard to the claimed impairment of petitioners' right to traverse the Refuge, the court noted that petitioners "ha[d] not spelled out the property interest underlying that assertion in any detail." *Id.* at 20a. The court further explained that, if petitioners' claimed interest was an easement of necessity, "[t]here is nothing in the regulation that by its terms restricts [petitioners'] right to cross the refuge to reach their base of operation on the island." *Id.* at 22a. The court therefore found "no occasion to decide whether [petitioners'] contract rights * * * carried with them the right of access to the island and whether a restriction on such access would have constituted a compensable taking." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 18-31) that the court of appeals erred in affirming the dismissal of their takings claim. The decision of the Federal Circuit is correct and

does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The court of appeals correctly affirmed the dismissal of petitioners' claims. The court assumed that petitioners' rights under the Palmyra Licenses could qualify as "property" within the meaning of the Just Compensation Clause. Pet. App. 6a. But as both the CFC and the court of appeals explained, the government's actions in this case cannot be said to have "taken" petitioners' rights under the contract because the government did not appropriate or regulate petitioners' property. *Id.* at 7a-12a, 34a-35a. Instead, the government regulated activities on its own waters, which it had the full authority to do.

As petitioners acknowledge (Pet. 1, 2, 3), the only alleged property right at issue is petitioners' contract right to conduct commercial fishing operations on the emergent land of the Palmyra Atoll. Petitioners do not assert that the Palmyra Licenses provided them with any right to engage in commercial fishing in the waters surrounding the atoll. Pet. App. 5a. Any such claim would fail because the United States has sovereign authority over the territorial sea and the EEZ. *Ibid.*; see p. 2, *supra*. Although the government's regulation of its own sovereign territory may affect the value of petitioners' contract rights, the government has neither appropriated those rights nor attempted to regulate petitioners' conduct on the land of the atoll. See Pet. App. 18a. Because the government "regulated conduct as to which [petitioners] had no protectable property interest," the courts below correctly dismissed petitioners' takings claim. *Id.* at 19a.

That conclusion follows from this Court's decisions in *Omnia Commercial Co.* v. *United States*, 261 U.S. 502 (1923), and *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106 (1924), which considered taking claims that were premised on contract rights. In *Omnia*, the government requisitioned all steel produced at a certain plant. A private company that had a pre-existing contract right to purchase steel from the plant argued that the government's requisition of the steel effected a taking of its property. This Court held that the plaintiff's property had not been taken because the government had not acquired the contractual obligation or the right to enforce it, but had simply regulated the subject-matter of the contract. 261 U.S. at 507-513. In *Brooks-Scanlon*, by contrast, the Court did find a taking because the government had requisitioned the contract for the construction of a ship and had thereby acted directly upon the property right at issue (the contract). 265 U.S. at 119-123.

Under those principles, no Fifth Amendment taking occurred in this case because the government acted to regulate an area over which it possessed exclusive authority and as to which petitioners did not possess any property right. Indeed, the relationship between the relevant government action and the plaintiffs' contract rights is considerably more attenuated here than in *Omnia*. In that case, the government requisitioned the very steel that the plaintiff had a contractual right to purchase, but the Court held that the plaintiff had suffered no Fifth Amendment deprivation because the government had not taken the contract itself. Here, by contrast, the government has not regulated the activity in which petitioners have a contractual right to engage (*i.e.*, the conduct of specified operations on the Palmyra

Atoll); it has simply made that contract right less valuable by banning commercial fishing in the surrounding waters. Dismissal of petitioners' takings claim therefore follows *a fortiori* from the decision in *Omnia*.

Petitioners suggest (Pet. 4) that the government has taken their property by denying them access to the pier and denying them the right to traverse the Refuge to reach the atoll. The court of appeals correctly rejected those claims. The court explained that petitioners had waived the claim regarding the pier by failing to assert it in the CFC. Pet. App. 19a. Indeed, petitioners asserted in the CFC that the government's regulations do not affect their activities on the "emergent lands or fixtures appurtenant thereto." *Ibid.* In any event, as the court of appeals explained, "nothing on the face of the regulation * * * suggests any restriction on the use of the pier." *Ibid.* The court of appeals likewise observed that nothing in the regulation limited petitioners' right to cross the Refuge, and that petitioners had not identified any action taken by the Department of the Interior that would have that effect. *Id.* at 21a-22a.

There was consequently no occasion for the courts below to consider whether government interference with access to the pier or travel through the Refuge to reach the atoll would have effected a compensable taking. And because petitioner does not take issue with the court of appeals' waiver holding or its analysis of the regulation, there is likewise no need for this Court to address those questions.

2. Petitioners contend (Pet. 5-8, 18-20) that this Court should grant review to decide whether private contracts are property protected by the Just Compensation Clause. The court of appeals agreed with petitioners, however, that "contract rights can be the subject of

a takings action," and it assumed that petitioners' own contract rights could be the basis for a takings claim. Pet. App. 6a-7a (citing *Lynch* v. *United States*, 292 U.S. 571, 579 (1934), and *United States* v. *Petty Motor Co.*, 327 U.S. 372, 381 (1946)). The court rejected petitioners' takings claim because the government had not appropriated petitioners' contract rights but had simply engaged in lawful regulation of its own property. The government's brief in the court of appeals likewise agreed that contract rights may be considered "property" within the meaning of the Just Compensation Clause. Gov't C.A. Br. 14; see Gov't Resp. to Pet. for Reh'g 8. Because there is no dispute on this question, and because petitioners acknowledge (Pet. 6) that the court of appeals decided the issue in their favor, this Court's review is not warranted.

In any event, petitioner is mistaken in contending (Pet. 5-8, 18-20) that there is disagreement among the circuits on this question. As petitioners note (Pet. 5), this Court has stated that valid contracts are property within the meaning of the Fifth Amendment. See, *e.g.*, *Lynch*, 292 U.S. at 579; *Omnia*, 261 U.S. at 509. In *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986), the Court again recognized that contracts may be "property" for purposes of the Just Compensation Clause, while also holding that not all regulation of contract rights effects a compensable taking.

The courts of appeals have faithfully applied this Court's holdings. Contrary to petitioners' contention (Pet. 5-8), the Seventh Circuit has not held that contracts cannot qualify as property for purposes of the Just Compensation Clause. In *Pro-Eco, Inc.* v. *Board of Comm'rs*, 57 F.3d 505, cert. denied, 516 U.S. 1028 (1995), the case on which petitioners principally rely in assert-

ing a circuit conflict, the Seventh Circuit acknowledged this Court's statements that contract rights can constitute compensable property interests. See *id.* at 510. The court simply concluded that, because "options to buy real estate do not create property rights in real estate" under Indiana law, the plaintiffs' option to purchase land in Indiana was "not a property interest protected by the Takings Clause." *Id.* at 509-511. Similarly, in *Peick* v. *Pension Benefit Guaranty Corp.*, 724 F.2d 1247 (7th Cir. 1983), cert. denied, 467 U.S. 1259 (1984), the court did not hold that contract rights are never "property" for takings purposes. Rather, it held that the alleged contract right at issue—the "right" to avoid liability imposed by government regulation—was not a "legally enforceable and recognizable interest in distinct property." *Id.* at 1275-1276. And petitioners acknowledge (Pet. 6-7) that the language regarding whether contract rights are "property" in *Pittman* v. *Chicago Board of Education*, 64 F.3d 1098 (7th Cir. 1995), cert. denied, 517 U.S. 1243 (1996), is *dicta*, because (as the court of appeals explained) the right to tenure at issue there arose from a statute rather than a contract. *Id.* at 1104.

Similarly, petitioners are mistaken in contending (Pet. 7) that the decision below conflicts with the Sixth Circuit's decision in *Ohio Student Loan Comm'n* v. *Cavazos*, 900 F.2d 894, cert. denied, 498 U.S. 895 (1990). In *Cavazos*, the court of appeals did not adopt a categorical rule against treatment of contracts as property for takings purposes. Instead, applying this Court's precedents, the court held that Congress's modification of a statute concerning federal reimbursement of state agencies for student loan defaults did "not breach any 'contract'" between the federal government and the state

agency. *Id.* at 900. Rather, the court viewed the agreements between the state and federal governments as simply a "codification of the cooperative relationship between the federal and state agencies" that did "not generate property rights under the takings clause." *Id.* at 901. The Second Circuit's decision in *Buffalo Teachers Federation* v. *Tobe*, 464 F.3d 362 (2006), cert. denied, 550 U.S. 918 (2007), likewise does not establish a circuit conflict. As petitioners recognize (Pet. 7-8), the court in that case assumed that contracts before it *were* property for takings purposes. See *Tobe*, 464 F.3d at 375.

3. Petitioners also contend (Pet. 8-14, 21-25) that this Court should grant review to determine whether regulatory-takings principles apply to contract rights. This case would present a poor vehicle to consider that question. Contrary to petitioners' contention (Pet. 12), the court of appeals did not "reject[] any possibility that a regulatory taking of a private contract could occur." Instead, the court of appeals determined that no taking occurred in this case because the government did not appropriate or directly regulate petitioners' property. Pet. App. 8a-9a, 13a. Because the court of appeals concluded that the government had only "regulated conduct as to which [petitioners] had no protectable property interest," *id.* at 19a, it had no occasion to consider whether the regulation imposed sufficiently severe burdens to qualify as a taking.*

* None of the cases cited by petitioners suggest that a regulatory-takings analysis should be conducted in the absence of any direct interference with contract rights. As petitioners acknowledge (Pet. 13), *United States Fidelity & Guaranty Co.* v. *McKeithen*, 226 F.3d 412, 414-419 (5th Cir. 2000), cert. denied, 532 U.S. 922 (2001), and *Vesta Fire Insurance Corp.* v. *Florida*, 141 F.3d 1427, 1429-1434 (11th Cir. 1998), both involved regulation that directly altered contractual rights. In

Petitioners contend (Pet. 11-12) that the court of appeals implicitly rejected a regulatory-takings theory because the court did not use the term "regulatory taking" in its opinion or conduct the fact-specific analysis set out in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978). The court had no occasion to apply regulatory-takings principles, however, because petitioners did not satisfy the threshold requirement of identifying a "direct restraint on any property interest held by [petitioners]." Pet. App. 13a. Because petitioners did not show that the government was regulating their property (as opposed to the government's own waters), the court did not need to consider whether the *extent* of the regulation was sufficiently severe to constitute a taking.

In their court of appeals briefs and rehearing petition, petitioners did not distinguish between appropriations and regulatory takings, and they did not ask the court to conduct a *Penn Central* analysis. Instead, they simply alleged that the government had "nullif[ied]" their contract by regulating activities in its own waters, without specifying whether that action effected an appropriation or a regulatory taking. Pet. C.A. Br. 14-15. This Court ordinarily does not consider issues that were not pressed or passed upon below. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (this Court is one of "review, not of first view"); *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not

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Holliday Amusement Co. v. *South Carolina*, 493 F.3d 404 (4th Cir. 2007), the court of appeals determined that the gambling regulation at issue was a classic exercise of police power, and that "analysis under existing takings frameworks" was therefore "unnecessary." *Id.* at 410, 411 n.2.

decide questions not raised or litigated in the lower courts.").

Finally, the Federal Circuit *has* applied regulatory-takings analysis to contract rights. In *Cienega Gardens* v. *United States*, 331 F.3d 1319 (Fed. Cir. 2003), the court conducted an extensive *Penn Central* analysis and concluded that property owners' contract rights to prepay their mortgages and exit low-income housing programs after 20 years had been taken by the government when Congress modified the terms of the contracts. *Id.* at 1336-1353; see Pet. App. 13a-15a (distinguishing *Cienega Gardens* on the ground that the government actually altered the contracts at issue there). Petitioners offer no sound basis for concluding that the court of appeals in this case departed *sub silentio* from established circuit precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
JEANNE E. DAVIDSON
MARK A. MELNICK
MAAME A.F. EWUSI-MENSAH
Attorneys

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